

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

DVH COMPANIES, INC., §
D/B/A SOUTHWEST WHEEL COMPANY, §
AND D/B/A ETRAILERPART.COM, §
§
Plaintiff §
§ Civil Action No. 3-06CV2084-P
vs. §
§
BROPFS CORPORATION §
D/B/A ETRAILER.COM, §
§
Defendant. §

**APPENDIX IN SUPPORT OF MOTION TO SET ASIDE ENTRY OF DEFAULT
AND IN OPPOSITION TO PLAINTIFF'S MOTION FOR ENTRY OF DEFAULT**

Pursuant to Local Rule of Civil Procedure 7.1(i), Defendant Bropfs Corporation d/b/a etrailer.com (“Bropfs” or “Defendant”) submits this Appendix in support of its motion to set aside entry of default and in opposition to Plaintiff’s motion for entry of default, which contains the following documents:

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Declaration of Cathy J. Futrowsky	9-10

Dated: December 15, 2006

Respectfully submitted,

PATTON BOGGS LLP

/s/ Talcott J. Franklin

Talcott J. Franklin
State Bar No. 24010629
2001 Ross Avenue, Suite 3000
Dallas, Texas 75201
Phone: (214) 758-1500
Fax: (214) 758-1550

OF COUNSEL:

Cathy J. Futrowsky
Gallop, Johnson & Neuman, L.C.
101 Constitution Avenue, N.W.
Suite 675 East
Washington, D.C. 20001
Telephone: (202) 682-0707

*Attorneys for Defendant/Counterclaim Plaintiff
Bropfs Corporation d/b/a etrailer.com*

CERTIFICATE OF SERVICE

This is to certify that the above and foregoing Appendix in Support of Motion to Set Aside Entry of Default and In Opposition to Plaintiff's Motion for Entry of Default was served upon all counsel of record by notice of electronic filing, pursuant to Fed. R. Civ. P. 5(b)(2)(D), today, December 15, 2006, *and U.S. mail.*

Pieter J. Tredoux
901 Main Street
Suite 6300
Dallas, Texas 75202
214-712-9291 (telephone)
214-712-5690 (telecopier)

and

Scott T. Griggs
Dennis T. Griggs
Griggs Bergen LLP
Bank of America Plaza
901 Main Street
Suite 6300
Dallas, Texas 75202
214-653-2400 (telephone)
214-653-2401 (telecopier)

/s/ Talcott J. Franklin

Talcott J. Franklin

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Plaintiff §
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BROPFS CORPORATION §
D/B/A ETRAILER.COM, §
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Defendant. §

Civil Action No. 3-06CV2084-P

DECLARATION OF SHANA L. BURLESON

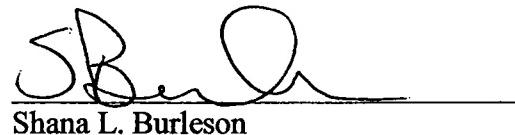
Shana L. Burleson, of full age, hereby declares as follows:

1. I am an attorney licensed to practice in the State of Texas, an associate in the law firm of Patton Boggs LLP, and have been working with Talcott J. Franklin in connection with his representation of Bropfs Corporation d/b/a etrailer.com ("Bropfs") in the above-captioned litigation. I hereby submit this Declaration in support of Bropfs' Motion to Set Aside Entry of Default and in opposition to Plaintiff's Motion for Entry of Default Judgment.

2. On the morning of December 12, 2006, I met with Shannon Conway, an associate at the Firm, regarding the time to respond to a complaint that has been served on the Texas secretary of state. Ms. Conway explained that she found a case, *Brown v. Bandai America, Inc.*, No. 3-01-CV-0442-R, 2002 WL 1285265 (N.D. Tex. June 4, 2002), discussing the issue. She asked me to research Texas federal law to determine whether or not three days are added to the time for filing an answer when the secretary of state is served with a citation. After conducting

the legal research on the relevant LEXIS databases, I indicated to Ms. Conway that the only Texas federal case on point was *Brown v. Bandai America, Inc.*

Pursuant to 28 U.S.C. § 1746, I hereby declare under penalty of perjury that the foregoing is true and correct.



The image shows a handwritten signature in black ink. The signature consists of stylized initials "SB" followed by a surname. Below the signature, the name "Shana L. Burleson" is printed in a standard black font.

Executed on this 15th day of December, 2006.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

DVH COMPANIES, INC.,
D/B/A SOUTHWEST WHEEL COMPANY,
AND D/B/A ETRAILERPART.COM,

Plaintiff

vs.

BROPFS CORPORATION
D/B/A ETRAILER.COM,

Defendant.

§
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§
§
§

Civil Action No. 3-06CV2084-P

DECLARATION OF SHANNON W. CONWAY

SHANNON W. CONWAY, of full age, hereby declares as follows:

1. I am an attorney licensed to practice in the State of Texas, an associate in the law firm of Patton Boggs LLP, and have been working with Talcott J. Franklin in connection with his representation of Bropfs Corporation d/b/a etrailer.com ("Bropfs") in the above-captioned litigation. I hereby submit this Declaration in support of Bropfs' Motion to Set Aside Entry of Default and in opposition to Plaintiff's Motion for Entry of Default Judgment.

2. On the morning of December 12, 2006, I met with Mr. Franklin regarding his receipt of the Complaint filed in this litigation against Bropfs. At Mr. Franklin's request, I began researching the date on which Bropfs' response would be due.

3. During my research on December 12, 2006, I came across this Court's decision in *Brown v. Bandai America, Inc.*, No. 3-01-CV-0442-R, 2002 WL 1285265 (N.D. Tex. June 4, 2002). Based upon my reading of this case, as well as Rules 5 and 6(e) of the Federal Rules of Civil Procedure, I determined that Bropfs' response was not overdue as of December 12, 2002, but that we had an additional two days to file. I reported my findings to Mr. Franklin on December 12, 2006, and the two of us immediately began drafting Bropfs' Answer and Counterclaim. In the meantime, I enlisted one of our Firm's junior associates to perform additional electronic research on the issue of Bropfs' response date and to see if there were any Texas federal district court decisions that reached a different conclusion than the *Brown* court on the response date. No additional decisions or different findings were reported to me.

4. On the afternoon of December 12, 2006, I also checked the Court's docket for this litigation through our Firm's "PACER" account, and the docket did not list any filings by Plaintiff requesting an Entry of Default or moving for the Entry of a Default Judgment. I reported this information to Mr. Franklin, as well.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct.

Shannon Conway
Shannon W. Conway

Executed on this 15th day of December, 2006.

IN THE UNITED STATES DISTRICT COURT
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DALLAS DIVISION

DVH COMPANIES, INC., §
D/B/A SOUTHWEST WHEEL COMPANY, §
AND D/B/A ETRAILERPART.COM, §
Plaintiff §
vs. §
BROPF'S CORPORATION §
D/B/A ETRAILER.COM, §
Defendant. §

Civil Action No. 3-06CV2084-P

DECLARATION OF TALCOTT J. FRANKLIN

Talcott J. Franklin, of full age, hereby declares as follows:

1. I am a partner at Patton Boggs LLP. I represent Defendant in the above-referenced action.
2. On December 11, 2006, I was asked via email if I could represent Defendant in the above-referenced action, which was my first knowledge or indication that the Defendant wished to retain my services. The email informed me that the date to respond to the Complaint was December 26, 2006. I reviewed the email on my BlackBerry wireless communication device. At the time, I was in the State of New York, and did not return to Dallas, Texas until approximately 9:30 p.m. on December 11, 2006.
3. On December 12, 2006, I received the Complaint at 10:24 a.m. and discovered that the Secretary of State was served on November 21, 2006. I immediately had a trusted senior associate in my office, Shannon Conway, research the response date. Shortly after 1 p.m. on December 12, 2006, Ms. Conway presented me with her findings. Based on a case from the

Northern District of Texas and her reading of the Federal Rules of Civil Procedure, she calculated the response date as December 14, 2006, 23 days after service. We immediately began preparing Defendant's Answer and Counterclaim based on this response date.

4. I also placed a call on December 12, 2006 to Plaintiff's Counsel, Scott T. Griggs. I spoke to a receptionist and informed her of the case on which I was calling, and asked her to have Mr. Griggs call me that day. I distinctly recall telling the receptionist that I was calling on the "DHV v. Bropfs Corporation" case because I had trouble pronouncing the word "Bropfs" and had to repeat it.

5. Our Answer and Counterclaim was prepared and ready to file on December 14, 2006. Late in the day on December 14, 2006, I learned through Ms. Conway's check of the electronic filing system as she prepared to file the Answer and Counterclaim that Plaintiff had filed a Request for Clerk's Entry of Default and a Motion for Entry of Default against Defendant on December 12, 2006.

6. As a consequence, we re-checked the authority on which we based our calculation of the response date. We also checked the authority upon which Plaintiff based its assertion that the Answer was due on December 11, 2006. Finding nothing in those cases indicating that the response date was twenty days after service on the secretary of state instead of 23 days, we filed the Answer and Counterclaim on December 14, 2006, and began preparing a Motion to Set Aside Entry of Default and an Opposition to Plaintiff's Motion for Entry of Default Judgment.

7. On December 13, 2006, Mr. Griggs' receptionist called me to tell me Mr. Griggs was extremely busy and could not call me until after 3 p.m. that day. From December 13, 2006 on, Mr. Griggs and I played "phone tag" until the morning of December 15, 2006, when I asked him and Mr. Tredoux to set aside the default judgment. I also sent Mr. Tredoux a copy of *Brown*

v. *Bandai America, Inc.*, No. 3-01-CV-0442-R, 2002 WL 1285265 (N.D. Tex. June 4, 2002).

Mr. Tredoux later called me to state that Plaintiff opposed the motion to set aside the default judgment.

8. The costs and expenses associated with this motion were entirely avoidable if Plaintiff's Counsel had called either me or Ms. Furtowsky to determine whether or not Defendant intended to file an answer, as required by the Texas Lawyer's Creed: A Mandate for Professionalism, art. III, § 11 (Nov. 1989) ("I will not take advantage, by causing any default or dismissal to be rendered, when I know the identity of an opposing counsel, without first inquiring about that counsel's intent to proceed.").

9. While I have only been recently retained on this matter, I have reviewed documents indicating actual consumer confusion between Plaintiff and Defendant regarding the Plaintiff's use of the etrailerpart.com web site and purported mark. Two of those documents are summarized in Defendant's Answer and Counterclaim. Furthermore, the Answer and Counterclaim are true and accurate based on my initial investigation of the facts.

Pursuant to 28 U.S.C. § 1746, I hereby declare under penalty of perjury that the foregoing is true and correct.



Talcott J. Franklin

Executed on this 15th day of December, 2006.

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FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

DVH COMPANIES, INC.,
D/B/A SOUTHWEST WHEEL COMPANY,
AND D/B/A ETRAILERPART.COM,

Plaintiff
vs.
BROPF'S CORPORATION
D/B/A ETRAILER.COM,
Defendant.

Civil Action No. 3-06CV2084-P

DECLARATION OF CATHY J. FUTROWSKY

1. I am an adult of legal age residing in Silver Spring, Maryland, United States.
2. I am competent to make this Declaration.
3. I am an Of Counsel attorney with the law firm of Gallop, Johnson & Neuman, L.C., located at 101 South Hanley, Suite 1700, St. Louis, Missouri 63105. I am affiliated with the firm's Washington, D.C. office located at 101 Constitution Avenue, N.W., Suite 675 East, Washington, D.C. 20001.
4. I and our firm represent Bropfs Corporation d/b/a etrailer.com ("Bropfs") in intellectual property matters and in this lawsuit, along with the Dallas office of Patton Boggs LLP.
5. Counsel for DVH Companies, Inc., d/b/a Southwest Wheel Company and d/b/a etrailerpart.com ("DVH"), Mr. Scott Griggs and Mr. Peter Tredoux, have been aware that I am at least one of the attorneys representing Bropfs since at least as early as November 13, 2006, when Mr. Griggs addressed an electronic mail message to me in connection with the UDRP proceeding

DECLARATION OF CATHY J. FUTROWSKY – Page 1
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pending involving the etrailerpart.com domain name and copied Mr. Tredoux by email. I subsequently spoke with Mr. Griggs and Mr. Tredoux on November 16, 17 and 21, 2006 and exchanged several emails with them around that time and thereafter. Mr. Griggs and Mr. Tredoux availed themselves of the knowledge of my electronic mail address and telephone number to contact me during these contacts with them.

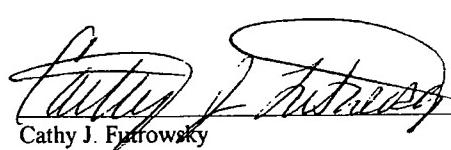
6. The last communication I have had with Mr. Griggs and Mr. Tredoux was on November 29, 2006, when Mr. Griggs sent me an electronic mail message.

7. I have not been contacted by Mr. Griggs, Mr. Tredoux, any of their colleagues, or anyone representing DVH since November 29, 2006, either by telephone, electronic mail or any other means.

8. I have not received a true and correct copy or copy of any sort of DVH's Motion for Entry of Default Judgment and Brief in Support, either by electronic mail, First Class U.S. Mail, or any other means.

Pursuant to 28 U.S.C. § 1746, I hereby declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed on: December 14, 2006



Cathy J. Futrowsky